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IN THE

Supreme Court of the United States

OCTOBER TERM, 1952

No. 544

PARK & TILFORD DISTILLERS CORPORATION,
Petitioner,

against

THE UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS AND BRIEF IN SUPPORT THEREOF

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January 12, 1953.

INDEX

PAGE

PETITION:

Statement 1

Jurisdiction to Review 2

Question Presented 2

Statutes Involved 2

Facts 4

Opinion Below 6

Reasons Relied On For Allowance of the Writ..... 6

BRIEF IN SUPPORT OF PETITION:

I. The Court below has decided an important question of Federal law which has not been, but should be, settled by this Court 8

II. The Court below has rendered a decision in conflict with decisions of certain Circuit Courts of Appeals and the Tax Court of the United States on analogous matters 9

III. The Court below has decided a Federal question in a way in conflict with applicable decisions of this Court 16

IV. The Court below has enunciated an extraordinary principle of Federal tax law which should be reviewed and reversed by this Court..... 19

Conclusion 21

Appendix 22

CASES CITED

PAGE

Bowers v. *Kerbaugh-Empire Co.*, 271 U. S. 170 (1926) 17

Carroll-McCreary Co., Inc. v. *Commissioner*, 124 F. 2d 303 (2d Cir. 1941) 14

Central R. Co. of New Jersey v. *Commissioner*, 79 F. 2d 697 (3d Cir. 1935) 10

Edward H. Clark, 40 B. T. A. 333 (1939) 10

Commissioner v. *Air Reduction Co.*, 130 F. 2d 145 (2d Cir. 1942), *cert. denied*, 317 U. S. 681 14

Commissioner v. *Auto Strop Safety Razor Co.*, 74 F. 2d 226 (2d Cir. 1935), *affirming*, 28 B. T. A. 621 (1933) 13

Commissioner v. *Culbertson*, 337 U. S. 733 17

Commissioner of Internal Revenue v. *Inland Finance Co.*, 63 F. 2d 886 (9th Cir. 1933) 14

William F. Davis, Jr., 17 T. C. 549 (1951) 10

William L. Dempsey, 10 T. C. M. 936; I. T. 4069 (10/21/51), No. 2, at p. 3 10

Dottenheim v. *Emerson Electric Mfg. Co.*, 77 F. Supp. 306 (E. D. N. Y. 1947) 10

Edwards v. *Cuba Railroad*, 268 U. S. 628 (1925) 18

Eisner v. *Macomber*, 252 U. S. 189 (1920) 15, 16

Glenshaw Glass Co., 18 T. C. No. 108 .....12, 17

Gratz v. *Claughton*, 187 F. 2d 46 (2d Cir. 1951), *cert. denied*, 341 U. S. 920 10

Great Northern Railway Co., 40 F. 2d 372 (8th Cir. 1930), *cert. denied*, 282 U. S. 855, *affirming*, 8 B. T. A. 225 (1927) 13

PAGE

Helvering v. *Campbell*, 313 U. S. 15 (1941) 5

Highlands Farms Corporation, 42 B. T. A. 1314 (1940) 10, 12

Merchants' Loan & Trust Company v. *Smietanka*, 255 U. S. 509 (1921) 17

Midland Valley R. R. Co., 57 F. 2d 1042 (10th Cir. 1932) *affirming*, 19 B. T. A. 423 (1930) 13

Raybestos-Manhattan, Inc. v. *United States*, 295 U. S. 727, 296 U. S. 60 9

Realty Bond & Mortgage Co. v. *United States*, 16 F. Supp. 771 (1936) 15

Smolowe v. *Delendo Corp.*, 136 F. 2d 231 (2d Cir. 1943), *cert. denied*, 320 U. S. 751 .....5, 10

Taft v. *Bowers*, 278 U. S. 470, 481 (1929) 17

United States v. *Safety Car Heating Co.*, 297 U. S. 88, 89 (1936) 17

STATUTES CITED

Internal Revenue Code, Section 22(a) (53 Stat. 9, as amended, 26 U. S. C. § 22(a)) 2

Judiciary and Judicial Procedure Title 28, U. S. C., Section 1255 (62 Stat. 928) 2

Securities Exchange Act of 1934, Section 16(a) (c. 404, 48 Stat. 896, 15 U. S. C. A. § 78(p)(a)) .. 3

Securities Exchange Act of 1934, Section 16(b) (c. 404, 48 Stat. 896, 15 U. S. C. A. § 78(p)(b)) 2, 3

MISCELLANEOUS

Securities and Exchange Commission, 17th Annual Report, Fiscal Year ended June 30, 1951, pp. 43, 209 9

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PARK & TILFORD DISTILLERS CORPORATION,
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No. 544

PETITION FOR A WRIT OF CERTIORARI

To the Honorable The Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Statement

Your petitioner, Park & Tilford Distillers Corporation,* respectfully prays for a writ of certiorari to the United States Court of Claims to review the judgment of that Court dated November 4, 1952 (~~T. 43,~~ R. 24),**

*The proceeding below was instituted in the name of "Park & Tilford, Inc." On June 30, 1950, that name was changed to "Park & Tilford Distillers Corporation" and, by order of the United States Court of Claims entered on April 3, 1952, the pleadings and prior proceedings were deemed amended accordingly.

**~~"T." references are to pages of the certified transcript of the record in this case, obtained from the United States Court of Claims and submitted herewith.~~ "R" references are to the printed record which accompanies this petition.

dismissing petitioner's suit for a refund of 1944 Federal income and personal holding company taxes in the aggregate amount of $285,257.24, including interest.

Jurisdiction to Review

The jurisdiction of this Court is invoked under Title 28, United States Code, Judiciary and Judicial Procedure, Section 1255 (62 Stat. 928).

Question Presented

The single question presented by this petition is whether the payment to a corporation by one of its directors, officers, or stockholders pursuant to Section 16(b) of the Securities Exchange Act of 1934 (c. 404, 48 Stat. 896, 15 U. S. C. A. § 78(p)(b)) constitutes the realization of taxable income by, and is taxable as income to, the corporation.

Statutes Involved

Section 22(a) of the Internal Revenue Code (53 Stat. 9, as amended, 26 U. S. C. § 22(a)) provides in part as follows:

> "SEC. 22. GROSS INCOME.
>
> "(a) GENERAL DEFINITION.—'Gross income' includes gains, profits, and income derived from salaries, wages, or compensation for personal service (including personal service as an officer or employee of a State, or any political subdivision thereof, or any agency or instrumentality of any one or more of the foregoing), of whatever kind and in whatever form paid, or from professions, voca-

tions, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever. . . ."

Sections 16(a) and (b) of the Securities Exchange Act of 1934 (c. 404, 48 Stat. 896, 15 U. S. C. §§ 78(p)(a) and (b)) provide as follows:

"(a) Every person who is directly or indirectly the beneficial owner of more than 10 per centum of any class of any equity security (other than an exempted security) which is registered on a national securities exchange, or who is a director or an officer of the issuer of such security, shall file, at the time of the registration of such security or within ten days after he becomes such beneficial owner, director, or officer, a statement with the exchange (and a duplicate original thereof with the Commission) of the amount of all equity securities of such issuer of which he is the beneficial owner, and within ten days after the close of each calendar month thereafter, if there has been any change in such ownership during such month, shall file with the exchange a statement (and a duplicate original thereof with the Commission) indicating his ownership at the close of the calendar month and such changes in his ownership as have occurred during such calendar month.

"(b) For the purpose of preventing the unfair use of information which may have been obtained by such beneficial owner, director, or officer by reason of his relationship to the issuer, any profit realized by him from any purchase and sale, or any sale and purchase, of any equity security of such issuer (other than an exempted security) within any period of less

than six months, unless such security was acquired in good faith in connection with a debt previously contracted, shall inure to and be recoverable by the issuer, irrespective of any intention on the part of such beneficial owner, director, or officer in entering into such transaction of holding the security purchased or of not repurchasing the security sold for a period exceeding six months. Suit to recover such profit may be instituted at law or in equity in any court of competent jurisdiction by the issuer, or by the owner of any security of the issuer in the name and in behalf of the issuer if the issuer shall fail or refuse to bring such suit within sixty days after request or shall fail diligently to prosecute the same thereafter; but no such suit shall be brought more than two years after the date such profit was realized. This subsection shall not be construed to cover any transaction where such beneficial owner was not such both at the time of the purchase and sale, or the sale and purchase, of the security involved, or any transaction or transactions which the Commission by rules and regulations may exempt as not comprehended within the purpose of this subsection."

Facts

David A. Schulte, a director, officer and stockholder of petitioner, made sales and purchases or purchases and sales of petitioner's stock within six months of each other. Upon demand by petitioner, Mr. Schulte made payments to it in June and August, 1944, aggregating $264,827.57. Those payments represented a sum equal to the "profits" realized by Mr. Schulte upon the aforesaid stock transactions and recoverable from him by petitioner pursuant to Section 16(b). Those "profits" were computed not in accordance

with the usual income tax rule* but by applying to Mr. Schulte's lowest priced purchases the highest priced sales within the six months' period before and/or after the dates of such purchases** (~~T. 16-17, 23, 25-26;~~ R. 8, 12-15)

Petitioner credited the amounts received from Mr. Schulte in 1944 to its capital surplus account on the ground that the receipt of 16(b) payments did not constitute taxable income. The Internal Revenue Agent who audited petitioner's 1944 income and personal holding company tax returns took a different view and concluded that petitioner's receipt of 16(b) "profits" from Mr. Schulte was taxable (~~T. 17, 20, 26-27;~~ R. 8-9, 11, 15-16)

In March, 1949, a deficiency in income tax and personal holding company tax was assessed on the $264,827.57 received from Mr. Schulte by petitioner, and the tax, *viz.*, $285,257.24, including interest, was paid by petitioner to the Collector of Internal Revenue for the Third District of New York upon his demand. Thereafter a refund claim was seasonably filed and, because no action was taken thereon within six months of the filing date, this suit was instituted to recover the full amount paid (~~T. 17-18, 26-27,~~ R. 9, 15-16).

On November 4, 1952, the lower court held that petitioner's receipt of the 16(b) "profits" paid to it by Mr. Schulte pursuant to statutory direction constitutes income to petitioner within the meaning of Section 22(a) of the

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*As this Court stated in *Helvering* v. *Campbell*, 313 U. S. 15 (1941), at pp. 20-21, "The general rule is that where shares of stock [sold] cannot be identified with any particular lots purchased, they will be charged against the earliest purchases," in accordance with the so-called "first-in, first-out" rule.

**In accordance with the rule set forth in *Smolowe* v. *Delendo Corp.*, 136 F. 2d 231 (2d Cir. 1943).

Internal Revenue Code. That conclusion, it is respectfully submitted, is erroneous and should be reviewed by this Court.

Opinion Below

The opinion below, which is dated November 4, 1952, is reported in full at 107 F. Supp. 941, and in Prentice-Hall Federal Tax Report Bulletin, November 13, 1952 (Vol. XXXIII, No. 46), at par. 72,668. The opinion is also set forth in full in the record submitted herewith (~~T. 35-41;~~ R. 17-24).

Reasons Relied on for Allowance of the Writ

It is respectfully submitted that this Court should grant the writ for the following reasons, all of which are "special and important" within the meaning of Rules 38(5) and 41(3) of the Rules of this Court:

(1) The United States Court of Claims has decided an important question of Federal law which has not been, but should be, settled by this Court. Such question is of importance not only to petitioner but to corporations generally;

(2) The Court below has rendered a decision in conflict with decisions of certain Circuit Courts of Appeals and the Tax Court of the United States on analogous matters;

(3) The Court below has decided a Federal question in a way in conflict with applicable decisions of this Court; and

(4) The Court below has enunciated an extraordinary principle of Federal tax law which should be reviewed and reversed by this Court.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari directed to the United States Court of Claims be issued out of and under the seal of this Court, to the end that this Court may review and determine the question presented by this petition; that the judgment of the lower court dismissing petitioner's suit for refund be reversed and judgment directed in favor of petitioner as prayed for in its petition filed in the Court below; and that your petitioner be granted such other and further relief as may be just and proper.

PARK & TILFORD DISTILLERS CORPORATION,
Petitioner,
by
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ALBERT ROSENBLUM,
Of Counsel.

January 12, 1953.

BRIEF IN SUPPORT OF PETITION

POINT I

THE COURT BELOW HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT.

Perhaps the most fundamental question in Federal tax law is: What is income? One aspect of that question is whether the receipt by a corporation of a Section 16(b) payment is income to the recipient. The question is one of first impression, and it does not appear that any court (excluding, of course, the lower court's decision in the instant case) has heretofore decided that question.

The question whether the receipt by a corporation of a 16(b) payment is income to the recipient is of importance not only to petitioner in this case, as well as in other cases or claims which petitioner will soon institute or file; the question is also of importance to other corporations which may find themselves *vel non* the recipients of 16(b) payments. The number of cases* under Section 16(b) of the Securities Exchange Act of 1934 indicates that the 16(b) problem is one which has demanded and obtained considerable attention in the courts. Moreover, statistics published by the Securities and Exchange Commission indicate that more than 20,000 reports under Section 16(a) of the Securities Exchange Act were filed during the fiscal year ended June 30, 1951, by the officers, directors or stockholders of the 2,188 corporations having securities admitted to dealings on all national securities exchanges as of June

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*See Appendix annexed hereto.

30, 1951.* Since the existence of a possible 16(b) violation can be determined from reports filed under Section 16(a), it would appear from the large number of those reports that the instances in which corporations may find themselves recipients of 16(b) payments are considerable. Accordingly, the question presented by the instant petition is of importance not only to petitioner but to other corporations as well.

POINT II

THE COURT BELOW HAS RENDERED A DECISION IN CONFLICT WITH DECISIONS OF CERTAIN CIRCUIT COURTS OF APPEALS AND THE TAX COURT OF THE UNITED STATES ON ANALOGOUS MATTERS.

This Court has granted certiorari to review a judgment of the United States Court of Claims in order, among other things, to resolve a conflict between a decision of that Court and a decision of a Circuit Court of Appeals. *Raybestos-Manhattan, Inc.* v. *United States*, 295 U. S. 727, 296 U. S. 60. Moreover, Rules 38(5) and 41(3) of the Rules of this Court indicate that a conflict between a decision of the United States Court of Claims and a decision of a Circuit Court of Appeals is one of the "special and important" reasons for which certiorari will be granted. In the instant case, there is such a conflict, as well as an additional conflict between a decision of the Court of Claims and decisions of the Tax Court of the United States.

In its brief below, petitioner argued, among other things, that the obligation imposed upon the statutory violator by

*Securities and Exchange Commission, 17th Annual Report, Fiscal Year ended June 30, 1951, pp. 43, 209.

Section 16(b) is in the nature of a penalty. *Smolowe* v. *Delendo Corp.*, 136 F. 2d 231 (2d Cir. 1943), *cert. denied*, 320 U. S. 751; *Gratz* v. *Claughton*, 187 F. 2d 46 (2d Cir. 1951), *cert. denied*, 341 U. S. 920; *Dottenheim* v. *Emerson Electric Mfg. Co.*, 77 F. Supp. 306 (E. D. N. Y., 1947); *William F. Davis, Jr.*, 17 T. C. 549 (1951); *William L. Dempsey*, 10 T. C. M. 936; I. T. 4069 (10/21/51, No. 2, at p. 3). Based on that proposition, petitioner contended that the receipt by a corporation of a penalty is analogous to the receipt of punitive damages, and that the receipt of punitive damages does not constitute taxable income. *Central R. Co. of New Jersey* v. *Commissioner*, 79 F. 2d 697 (3d Cir. 1935); *Edward H. Clark*, 40 B. T. A. 333 (1939); *Highland Farms Corporation*, 42 B. T. A. 1314 (1940).

The lower court refused to follow the three last-cited cases because they "seem to rest only upon the definition of income given by the Supreme Court in *Eisner* v. *Macomber* [252 U. S. 189], [and] do not seem to us persuasive." (~~T. 41~~, R. 23).

The pertinent facts in the *Central Railroad* case were as follows:

An officer of the taxpayer corporation had surreptitiously caused another corporation to be created and, in the operation of the new corporation, the officer took advantage of knowledge previously acquired by him as a result of his connection with the taxpayer corporation. The latter brought suit for an accounting of profits, alleging a conspiracy to defraud, and the suit was ultimately settled by a transfer of property to it. The Commissioner of Internal Revenue determined that the value of the property should be included in the gross income of the taxpayer corpora-

tion. The Third Circuit reversed the Commissioner, stating (p. 699):

> "It is apparent then that income must come from capital or labor, or both, including gains from the sale of assets. That being so, the value of the property which the taxpayer received cannot be traced to either capital or labor. As the taxpayer said in the paragraph quoted above, *what it received was in the nature of a 'windfall'. It was a penalty imposed by the law on a faithless fiduciary,* a gain granted gratuitously because of the necessity of keeping persons in positions of trust beyond the temptation of double dealing. It cannot be said that it was derived wholly or in part from the use of the taxpayer's capital or labor. The nearest that one can come to that is to say that Joyce and his dummies could not have operated but for Joyce's position with the taxpayer and its type of business. But Joyce's *ultra vires* operations were not carried on by the use of the taxpayer's capital and labor. They were entirely separate and apart from its business structure." [Italics added.]

To the extent that the decision in the *Central Railroad* case constitutes a holding that the recovery of a "penalty imposed by the law on a faithless fiduciary" does not constitute taxable income to the recipient, the lower court's refusal to follow that decision creates a conflict with a decision of a Circuit Court on the same principle of law. That is so because the obligation imposed upon the statutory violator by Section 16(b) is in the nature of a penalty, with the result that a corporation's receipt of a 16(b) payment constitutes the recovery of a penalty which, like the recovery of punitive damages, is not taxable to the recipient.

In the *Clark* case, *supra,* the Board of Tax Appeals held that a voluntary payment by tax counsel to his client, the taxpayer, to indemnify the client for a loss sustained as a consequence of counsel's incorrect advice was not income to the taxpayer inasmuch as it was compensation for loss and was not derived from capital or labor or from both combined.

In the *Highland Farms* case, *supra,* where a bank mortgagee was required to pay punitive damages to a mortgagor as the result of casting aspersions upon the latter's business, the Board of Tax Appeals, in holding that punitive damages do not constitute taxable income to the recipient, stated (p. 1322):

> "The punitive damages of $10,000 . . . were awarded neither for loss of capital nor for loss of profits, but as a penalty. . . . A penalty imposed by law does not meet the test of taxable income set forth in *Eisner* v. *Macomber,* 252 U. S. 189, as ' "The gain derived from capital, from labor, or from both combined," provided it be understood to include profit gained through a sale or conversion of capital assets.' The respondent erred in adding the $10,000 punitive damages to petitioner's taxable income."

By declining to follow the above three cases, the lower court by necessary implication also declined to follow the more recent decision of the Tax Court in *Glenshaw Glass Co.,* 18 T. C. No. 108, to the same effect, *viz.*:

> " . . . It has long been established that punitive damages do not meet the test of taxable income set forth in Eisner v. Macomber, 252 U. S. 189, 1953, as ' " *** the gain derived from capital, from labor, or from both combined," provided it be understood to include profit gained through a sale or conversion of capital assets *** '. *Central R. Co.* v. *Commis-*

> *sioner,* 79 Fed. (2d) 697, *Highland Farms Corp.,* 42 B. T. A. 1314 [Dec. 11, 393]. This basic definition has been recently cited with complete approval in *Commissioner* v. *Culbertson,* 337 U. S. 733, 740, and has been adhered to by the respondent in his Regulations 111, section 29.22(a)-1. Therefore, on the authority of those cases, we follow this rule of long standing that has never been questioned in any court and hold that the sums received in settlement of the punitive damages claims do not constitute taxable income."

Not only did the lower court refuse to follow, as "not persuasive", the decisions in the *Central Railroad, Clark, Highland Farms,* and *Glenshaw Glass* cases, *supra;* it also declined to follow several other closely analogous decisions by various Circuit Courts of Appeals, which petitioner relied on below in support of its contention that not all pecuniary advantage to a corporation results in income to it, *viz.*:

> *Midland Valley R. R. Co.,* 57 F. 2d 1042 (10th Cir. 1932), *affirming* 19 B. T. A. 423 (1930), and *Great Northern Railway Co.,* 40 F. 2d 372 (8th Cir. 1930), *cert. denied,* 282 U. S. 855, *affirming* 8 B. T. A. 225 (1927), which held that contributions by shippers to induce the construction of spur tracks and other facilities do not constitute taxable income to the recipient;
>
> *Commissioner* v. *Auto Strop Safety Razor Co.,* 74 F. 2d 226 (2d Cir. 1935), *affirming* 28 B. T. A. 621 (1933), which held that a voluntary contribution to, or forgiveness on the part of a shareholder of a debt due from, a corporation is not income to it;

Carroll-McCreary Co., Inc. v. *Commissioner,* 124 F. 2d 303 (2d Cir. 1941), which held that where a corporation realizes gain as the result of the cancellation or forgiveness of debts due its officers for prior years' unpaid salaries, that is a capital contribution and not income to the corporation;

Commissioner v. *Air Reduction Co.,* 130 F. 2d 145 (2d Cir. 1942), *cert. denied,* 317 U. S. 681, which held that where a corporation deals in its own stock and sells it at a premium, the corporation does not realize income, even if the stock transactions result in profit to it, so long as the purpose of dealing in its own stock is to readjust its capital structure;

Commissioner of Internal Revenue v. *Inland Finance Co.,* 63 F. 2d 886 (9th Cir. 1933), which held that amounts forfeited to a corporation do not constitute income to it.

With respect to the foregoing decisions, the Court of Claims stated (~~T. 40;~~ R. 22):

> "... Such of them as may rest merely upon the definition of income in Eisner v. Macomber, which the Supreme Court no longer regards as authoritative except in cases involving stock dividends or analogous problems, we respectfully decline to follow, since we think they are not consistent with the tax statutes."

With the exception of the *Inland Finance* case, none of the six last-cited decisions "rest merely upon the definition of income in *Eisner* v. *Macomber.*" Nevertheless, the lower court chose not to follow those decisions although they are

closely analogous to the present case in that they exemplify the many different ways in which the receipt of pecuniary advantage by a corporation has been held not to result in income to it. By parity of reasoning, the receipt of a 16(b) payment should not be held to constitute income to the corporation even though it results in pecuniary advantage to it.

As to the *Inland Finance* case, which does rest on the definition of income set forth in *Eisner* v. *Macomber,* it is pertinent to note that the United States Court of Claims itself followed that case in *Realty Bond & Mortgage Co.* v. *United States,* 16 F. Supp. 771 (1936). There the Court of Claims, in holding that payments forfeited on stock subscriptions do not constitute taxable income to the recipient, quoted from the *Inland Finance* case as follows:

> "We are of opinion that the Board correctly determined that the forfeited payments did not constitute 'income', as the term has been defined; namely, gain derived from capital or labor, or from both combined. Eisner v. Macomber, 252 U. S. 189, 207, 40 S. Ct. 189, 64 L. Ed. 521, 9 A. L. R. 1570."

The importance of the cases holding that forfeiture to a corporation of stock subscription payments does not result in income to the corporation is that 16(b) "profits" are also "forfeited" to the corporation,* with the result that receipt

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*In *Gratz* v. *Claughton,* 187 F. 2d 46 (2d Cir. 1951), *cert. denied,* 341 U. S. 920, Chief Judge Learned Hand stated (p. 49):

> ". . . The section [16(b)] forfeits the profits because it forbids dealings in the shares. . . ."

Also, in *William F. Davis, Jr.,* 17 T. C. 549 (1951), the Tax Court stated:

> ". . . The profit realized is forfeited to the corporation, not restored to a stockholder who may have been injured. . . ."

of such "profits" should be held not to constitute taxable income.

The lower court's decision, it is respectfully submitted, is in conflict not only with the Third Circuit's decision and the cited Tax Court decisions on the question of punitive damages; it is also in conflict with the several other Circuit Court decisions cited above. Such conflict is a "special and important" reason for the allowance of the writ prayed for.

POINT III

THE COURT BELOW HAS DECIDED A FEDERAL QUESTION IN A WAY IN CONFLICT WITH APPLICABLE DECISIONS OF THIS COURT.

In its brief below, petitioner relied, among other things, on this Court's decision in *Eisner* v. *Macomber,* 252 U. S. 189 (1920), where "income" was defined (p. 207):

> "'. . . as the gain derived from capital, from labor, or from both combined,' provided it be understood to include profit gained through a sale or conversion of capital assets . . ."

We recognize, of course, that the question in the *Macomber* case was whether income had been "realized" by a corporation's distribution of a common stock dividend to its shareholders in proportion to their existing holdings of common stock. But we do not agree with the lower court's statement (~~T. 40;~~ R. 22) that this Court "no longer regards [*Eisner* v. *Macomber*] as authoritative except in cases involving stock dividends or analogous problems." Indeed, as we pointed out in our brief below, the definition of "income" as set forth in *Eisner* v. *Macomber* is still re-

garded as authoritative by this Court. In this connection, we pointed out that in *Merchants' Loan & Trust Company* v. *Smietanka,* 255 U. S. 509 (1921), this Court stated that the *Eisner* v. *Macomber* definition of income was "frequently approved by this Court". That definition was, as this Court stated in *Bowers* v. *Kerbaugh-Empire Co.,* 271 U. S. 170 (1926), adopted "after full consideration". This Court there added that the "definition has been adhered to and applied repeatedly" (p. 175). The definition was reiterated in *Taft* v. *Bowers,* 278 U. S. 470, 481 (1929), and, again, in *United States* v. *Safety Car Heating Co.,* 297 U. S. 88, 89 (1936). As late as 1949, in *Commissioner* v. *Culbertson,* 337 U. S. 733, the *Eisner* v. *Macomber* definition of income was quoted with approval by this Court, which spoke of that definition as the "often iterated definition of income—the gain derived from capital, from labor, or from both combined" (p. 740). As the Tax Court recently observed in *Glenshaw Glass Co.,* 18 T. C. No. 108, *supra*:

> "This basic definition [in *Eisner* v. *Macomber*] has been recently cited with complete approval in *Commissioner* v. *Culbertson,* 337 U. S. 733, 740 [49-1 USTC par. 9323], and has been adhered to by the respondent in his Regulations 111, section 29.22 (a)-1. Therefore, on the authority of those cases, we follow this rule of long standing that has never been questioned in any court and hold that the sums received in settlement of the punitive damages claims do not constitute taxable income."

In deciding that 16(b) profits constitute taxable income to the recipient, the Court below has not only reached a result in conflict with *Eisner* v. *Macomber* but has decided the question presented in a way in conflict with this

Court's decision in *Edwards* v. *Cuba Railroad,* 268 U. S. 628 (1925). There this Court held that moneys paid to the Cuba Railroad Company, a New Jersey corporation which owned and operated a railroad in Cuba, by the Republic of Cuba did not constitute "income" to the recipient because

> ". . . The subsidy payments taxed were not made for services rendered or to be rendered. They were not profits or gains from the use or operation of the railroad, and do not constitute income within the meaning of the Sixteenth Amendment. See Stratton's Independence v. Howbert, 231 U. S. 399, 415, 34 S. Ct. 136, 58 L. Ed. 285; Eisner v. Macomber, 252 U. S. 189, 207, 40 S. Ct. 189, 64 L. Ed. 521, 9 A. L. R. 1570; Merchants' Loan & Trust Co. v. Smietanka, supra."

Clearly, the test of income as applied by this Court in the *Cuba Railroad* case is the test enunciated in *Eisner* v. *Macomber.* As in the *Cuba Railroad* case, the payments in the instant case "were not made for services rendered or to be rendered", nor were the payments in the instant case "profits or gains from the use or operation" of plaintiff's business. In holding that the payment in the instant case constitutes income, the lower court has not followed the test of income as set down by this Court either in *Eisner* v. *Macomber* or in the *Cuba Railroad* case. In short, the Court below has decided an important Federal question in a way in conflict with applicable decisions of this Court.

POINT IV

THE COURT BELOW HAS ENUNCIATED AN EXTRAORDINARY PRINCIPLE OF FEDERAL TAX LAW WHICH SHOULD BE REVIEWED AND REVERSED BY THIS COURT.

Perhaps of even greater importance than the taxability of a Section 16(b) payment, so far as this Court is concerned, is the effect of the decision below on the body of Federal tax law dealing with the question, What is income? As we read it, the lower court's decision holds that taxable income is realized by a recipient even though he has done nothing to earn it. So far as we are aware, that is the first case ever to have so held. If we are correct in our reading of the decision below, it follows that the lower court has announced a novel—and, it is submitted, an erroneous—principle which should be reviewed and reversed by this Court.

That the lower court's decision does hold that income is realized by a recipient even though he has done nothing to earn it appears from the following:

After quoting the general definition of "gross income" contained in Section 22(a), the lower court states (~~T. 36-37~~; R. 19):

> "The receipt of the money here in question seems not to fall within any of the language of Section 22(a) except the clause last quoted, 'gains or profits and income derived from any source whatever.' It was clearly not compensation for services, or profits from sales, or rent, interest or dividends. But it was 'income derived from any source whatever,' unless those words, as used in the statute, have a meaning more restricted than their apparent meaning."

The lower court then adds (~~T. 38;~~ R. 20) that the money in question "went into the plaintiff's treasury, it did not replace something which went out of plaintiff's ownership as a consideration for it." In other words, there was no consideration for the 16(b) payment to plaintiff. The money was paid to plaintiff not because of anything it did, but because of statutory compulsion only. Plaintiff did nothing to earn the money. It received the money only because the statute directs that the corporation receive the statutory violator's 16(b) profits. In short, the lower court's decision, as we read it, holds that income is realized by a recipient even though he has done nothing to earn it. So far as we are aware, that is the first case ever to have so held.

By holding that "the receipt of the money here in question seems not to fall within any of the language of Section 22(a) except the clause last quoted, 'gains or profits and income derived from any source whatever' ", despite the Court's statement that the 16(b) payment went into plaintiff's treasury without consideration from plaintiff, *i.e.*, without plaintiff having done anything to earn such payment, the lower court has in effect stated that taxable income includes every increase in net worth, unless it is specifically excluded by Section 22(b) of the Internal Revenue Code. Presumably, the lower court would hold that money found in the street constitutes taxable income and that a gift would also constitute taxable income in the absence of the exclusion contained in Section 22(b)(3) of the Internal Revenue Code. That is not the law as we understand it.

The lower court has not only decided an important question of Federal law which has not been, but should be, decided by this Court; the lower court has raised a serious

question as to the proper construction of Section 22(a) of the Internal Revenue Code. That question of Federal law is one which only this Court can resolve.

CONCLUSION

It is respectfully submitted that the issues raised by your petitioner involve important questions of Federal tax law, in respect both of the specific question raised by this petition and the broader question, What is income? Both those questions call for the exercise of the supervisory powers of this Court. Accordingly, your petitioner's petition for certiorari should be allowed.

Respectfully submitted,

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January 12, 1953.

APPENDIX

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Arbetman v. *Playford,* 83 F. Supp. 335 (D. C. N. Y. 1949).

Benisch v. *Cameron,* 81 F. Supp. 882 (D. C. N. Y. 1948).

Berkey & Gay Furniture Company v. *Wigmore,* S. D. N. Y. April 15, 1947 (unreported).

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